

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 25, 2023 at 1:30 p.m.

FINAL RULINGS

1. <u>21-23539</u> -E-13 <u>DVW</u> -1	DEREK WOLF Peter Macaluso	CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 10-19-21 [11]
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**U.S. BANK, NATIONAL
ASSOCIATION VS.**

Final Ruling: No appearance at the April 25, 2023 Hearing is required.

Local Rule 9014-1(f)(2) Motion— Hearing.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on October 19, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court continued the hearing, opposition and reply briefs were filed, and the final hearing set for December 14, 2021.

The hearing on the Motion for Relief from the Automatic Stay is continued to 1:30 p.m. on May 23, 2023, as jointly requested by the Parties.

CONTINUANCE OF APRIL 23, 2023 HEARING

Derek L. Wolf, the Debtor, and U.S. Bank, National Association, Trustee, the Movant, filed their Joint Ex Parte Motion requesting the court continue the hearing on this Motion to May 23, 2023. Dckt. 165.

They report that the Parties are continuing to engage in meaningful discussions and are addressing the application of monies received by Movant.

REVIEW OF MOTION AND PRIOR PROCEEDINGS IN THIS CONTESTED MATTER

U.S. Bank, N.A. as Legal Title Trustee for Truman 2016 SC6 Title Trust (“Movant” or “Creditor”) seeks relief from the automatic stay with respect to Derek Wolf’s (“Debtor”) real property commonly known as 7995 Alta Vista Lane, Citrus Heights, California (“Property”). Movant has provided the Declaration of Brian Gaske to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues on October 12, 2021, without any notice of filing of Debtor’s fourth consecutive bankruptcy case, Movant conducted its foreclosure sale on the property. Motion, Dckt. 11. At the time of the foreclosure sale, Debtor was due 25 months worth of mortgage payments, with a total of (\$25,150.25) in payments past due. Declaration, Dckt. 19. Movant specifies that due to the three prior consecutive bankruptcies prior to this one—all of which were dismissed—the nature of these payments as post or pre petition is not clear.

Movant requests several types of relief in this case. First, the annulment of the stay to make the foreclosure sale valid. Second, to terminate the stay going forward. Third, that the court order pursuant to 11 U.S.C. § 362(d)(4) that the automatic stay in a future filed case in the next two years will not automatically go into effect.

As the Civil Minutes for this Motion document, this matter has been a long and winding trail of issues, points, and ongoing disagreement. During this process Debtor has obtained counsel, a Plan confirmed, a Plan defaulted, and a related dispute now to be adjudicated in an Objection to Claim over the amount of the debt and application of payments.

Credit for the length of these proceedings does not go solely to the Parties, but the court has contributed significantly. Part of this has focused on insuring that Debtor, first attempting to prosecute this case in pro se and now with counsel, was afforded not only the opportunity to present and have his rights with respect to this Motion properly adjudicated, but that he also understood the process and that he has been afforded such opportunity, what the outcome from this litigation.

As this Contested Matter developed, it appeared to the court that a core dispute Debtor has asserted over the amount of the claim and proper application of payments should be “easily determined” through a “simple spreadsheet” computing the claim and payments made since the 2015 loan modification.

Trustee’s Non-Opposition

Trustee initially filed a non-opposition to this motion on October 26, 2021 (Dckt. 21). Trustee non-opposition was based on Debtor, in *pro se*, not getting documents filed.

Summary Relief From Stay Proceeding

As stated by the Bankruptcy Appellate Panel, relief from stay proceedings are summary proceedings that address issues arising only under 11 U.S.C. Section 362(d). *Hamilton v. Hernandez (In re Hamilton)*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427, at *8–9 (B.A.P. 9th Cir. Aug. 1, 2005) (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay in a Contested Matter (Federal Rule of Bankruptcy Procedure 9014). This was restated recently by the Bankruptcy Appellate Panel in *Harms v. Bank of N.Y. Mellon (In re Harms)*, 603 B.R. 19, 27 (B.A.P. 9th Cir. 2019), including:

Relief from stay proceedings are primarily procedural. *Veal v. Am. Home Mortgage Serv., Inc. (In re Veal)*, 450 B.R. 897, 914 (9th Cir. BAP 2011). They typically determine whether the equities justify releasing the moving creditor from the legal effect of the automatic stay. *Id.* Because of the limited scope of inquiry, neither the movant's claim nor its security should be litigated in the relief from stay proceeding. *Id.* (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985)); see also *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 1994) ("We find that a hearing on a motion for relief from stay is merely a summary proceeding of limited effect. . . ."). "Given the limited nature of the relief, . . . the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, . . . a party seeking stay relief need only establish that it has a colorable claim" *In re Veal*, 450 B.R. at 914-15 (emphasis added) (citing *United States v. Gould (In re Gould)*, 401 B.R. 415, 425 n.14 (9th Cir. BAP 2009)).

Though the court has discussed, and prodded the parties to address, some substantive matters such as proper computation of the secured claim and document the computation of the claim through a "simple spreadsheet," those issues are not adjudicated in this Motion for Relief From the Stay.

REVIEW OF FILE

Debtor commenced this case on October 12, 2021. On October 27, 2021, a chapter 13 Plan was filed by Debtor in *pro se*. Dckt. 24. The Plan provides for monthly payments by Debtor of \$1,500 for sixty (60) months. Plan, Nonstandard Provisions; Dckt. 24 at 7. Additionally, Debtor will pay the Plan off early "if awarded settlement from Social Security." *Id.*

The only claim provided for in the Debtor's *pro se* Plan was Movant's, for which Debtor is to pay \$500 a month toward the \$29,254.55 arrearage and \$1,016.32 for the post-petition monthly payment. These two payment total \$1,516.32, which is slightly more than the \$1,500 a month plan payment.

As addressed in the prior Civil Minutes, there appeared to be some significant financial feasibility issues with such Plan. The court noted that on Schedule J filed by Debtor in *pro se*, it included the statement, "If Rushmore will finally be fair and recognize my Mod Package that they have on file." In retrospect, this appears to be a reference to the 2015 Loan Modification.

REQUESTED ANNULMENT OF STAY

At the first hearing on this Motion Movant notified the court that the buyer at the foreclosure sale has terminated the contract in light of the circumstances, and Movant was no longer seeking to annul the stay.

JANUARY 25, 2022 HEARING

Debtor's newly obtained counsel appeared at the January 25, 2022 hearing on this Motion. He reported the efforts being made in the prosecution of this case and now a Chapter 13 Plan set for hearing in March 2022. Counsel also discussed his work with the Debtor to insure that Debtor understood that this case, in light of the many prior cases filed by Debtor in *pro se* that have been dismissed, is his final "fish or cut bait moment."

Debtor's counsel also noted that if the Debtor were to sell the residence now, he would have to repay the grant received, it not being forgiven for nine more years. The court projects that the recoverable equity for Debtor would be lower than previously appearing, but could still be \$25,000+ cash.

From a review of the Supplemental Schedules I and J (Schedule I being incomplete and not including the gross income from Debtor's business and rental property), it appears that performing a plan for five years may be problematic.

However, the court notes that Debtor's counsel (Debtor previously having commenced this case in *pro se*) substituted in only two weeks prior to the hearing, this may well be part of the "more work to be done" by Counsel working with Debtor.

The Trustee confirmed that he now has the correct address for Movant and the payment of the amounts in the proposed plan, including past payments, will be made from the funds available to the Trustee.

The court continues this hearing to afford Debtor and his new counsel to "fish" (whether through curing the arrearage through the Plan or selling the Residence and obtaining \$25,000+ of exempt proceeds), rather than merely "cutting bait" and losing the house (and any exempt value) through a foreclosure.

MARCH 25, 2022 Hearing

At the hearing on the Motion to Confirm, the Trustee reported that Debtor had not provided all of the information. After an extensive discussion in connection with the Motion to Confirm, the court concluded that for this case Debtor was at the "put up or shut up phase." He has promised to make certain payments, he is curing the default (a cashier's check in Debtor's counsel's hand) and has provided to make the payments electronically. Debtor should be allowed to show he can perform the plan in this case and not have it dismissed out from under him. The court granted the Motion to Confirm the Chapter 13 Plan, as it was amended at that hearing.

However, it also appears, as requested by counsel and the creditor seeking relief from the stay, that Debtor's performance bears close watching. Additionally, Debtor may benefit from knowing that there is a motion to dismiss and a motion for relief from stay pending, which he is fending off by performing the Plan.

SUPPLEMENTAL PLEADINGS FILED AND EVOLUTION OF ISSUES

The Parties have filed various pleadings and supplemental pleadings as the court brought them through the trail of this Contested Matter. The court summaries them as follows.

Debtor's Opposition

On November 19, 2021, Debtor, in *pro se*, filed an opposition to the Motion for Relief. Debtor states they need more time to reconcile their mortgage with U.S. Bank. Additionally, Debtor states they are missing accounting for \$91,600.00 that Keep Your Homes California granted him in 2018. Debtor also disputes penalties and fees of Rushmore and provides exhibits.

Movant's Response

Movant filed a reply in response to Debtor's opposition to the Motion for Relief from Automatic Stay on December 2, 2021. Dckt. 33. Movant states the Debtor has had the opportunity in his three prior bankruptcy filings to object to Movant's Proof of Claim or reconcile his mortgage, but has not done so.

Also, Debtor asserts that payments were made to Movant in his prior case. In Debtor's Case No. 20-22852, no pre-petition arrears were paid to Movant. Movant also believes the Mortgage Assistance loan received which was sufficient to bring the Debtor's loan current as of February/March 2018, "was in the sum of only \$61,131.14, and NOT the entire \$91,700 as alleged by the Debtor, and that the Debtor's account was credited for that amount on or around March 20, 2018 by U.S. Bank, the then servicer of Debtor's loan. Movant has to date been unable to locate any evidence that the sum of \$91,700 was received from the Mortgage Assistance loan/program."

Movant concludes that Debtor has set forth no substantive Opposition to Movant's request to terminate and/or annul the stay and as such the Motion should be granted as requested. Movant requests (I) *in rem* relief from the automatic stay, as set forth in its Motion, to proceed to conduct another sale of the Property and (ii) a finding that Movant's previously conducted sale of the Property did not violate the automatic stay.

The Court has now continued this hearing several times. As event have transpired, Debtor has confirmed a plan, and then defaulted on the plan.

Trustee's Status Report

On December 29, 2021, Trustee David P. Cusick filed a status report stating Debtor is delinquent \$1,500.00 in Plan payments and Debtor has failed to provide verification of income, 2 years of tax returns, 6 months of profit and loss statements and 6 months of bank statements.

Movant's Supplemental Pleadings for January 11, 2022 Hearing

For the January 11, 2022 hearing, Movant filed Supplemental Pleadings. Dckts. 43, 44. In the Supplemental Declaration, the testimony includes (identified by paragraph number in the Declaration):

5. Debtor states that he received a \$91,600.00 loan in approximately February 2018 from the California Help to Homeowner's Program.

6. A prior loan servicer was responsible for the loan that is the subject of this Motion at that time.

8., 9. Rushmore, the current loan servicer, has provided Debtor and the proposed counsel for Debtor with documents and records (including those from the period when the prior loan servicer was responsible for this loan), which include:

a. The sum of \$61,131.14 was received and applied to Debtor's loan in 2018.

b. Upon further review of the prior loan servicer's files, additional information has been provided Debtor and Debtor's proposed counsel showing that the \$91,700 was received in 2018 and applied to Debtor's loan. Exhibit A, Dckt. 44, is a printout of the loan history from the prior loan servicer's records (which unfortunately is not clearly set out in a set of tables, but consists of a lot of words and number squeezed on each page - with the court clearing noting that this is not the records of the current loan servicer, but what they received from the prior loan servicer.

9a. In the Declaration the obligation under the loan and application of the \$91,700 is stated as follows:

Principal Balance 1 st Lien	(\$170,465.08)		(\$36,400.00)	Deferred Principal 2 nd Lien
Application of March 20, 2018 \$97,700				
Due Date June 2015		\$7,292.61		
Due Date March 2016		\$1,620.58		
Due Date May 2016		\$1,639.91		
Due Date July 2016		\$4,904.70		
Due Date January 2017		\$4,904.70		
Due Date July 2017		\$4,465.50		
Due Date December 2017		\$4,465.50		
Due Date May 2018		\$256.35		
Due Date May 2018		\$1,019.00		
Due Date May 2018		\$61,131.14		
Total Monies Applied		\$91,699.99		

11. The \$91,700 was applied to the delinquent mortgage payments due for the months of June 1, 2015 through and including May 1, 2018.

In the Motion for Relief, Movant asserts that the arrearage at the time of the foreclosure sale was not less than \$25,150.24, which Movant states is for the period October 1, 2019 through October 1, 2021. Motion, ¶ 7; Dckt. 11.

Supplemental Pleadings for May 10, 2022 Hearing

On May 6, 2022, counsel for the Chapter 13 Trustee provided a Supplemental Declaration providing testimony concerning Debtor's performance under the confirmed Chapter 13 Plan. Dckt. 13. That testimony, identified by paragraph number in the Supplemental Declaration includes:

3. and 4. The Trustee received initial payments totaling \$1,500 and then payments in March and April 2022 totaling \$2,810.00, with a payment scheduled through TFS in the amount of \$1,100.00 which is anticipated to be received by May 11, 2022.
5. The Trustee computes Debtor to be delinquent \$3,069.00 in plan payments, with an additional payment of \$1,960.00 coming due on May 25, 2022.

The Trustee's counsel also notes that there is an Objection to Creditor's Claim pending, with a hearing set for June 28, 2022.

Supplemental Pleadings for June 1, 2022 Hearing

On May 25, 2022, Movant filed the Declaration of Brian Gaske, an Assistant Vice President for Rushmore Loan Management Services, LLC, the loan servicer. Dckt. 107. With respect to the receipt and applicant of the Save Your Home California monies, he states (identified by paragraph number of the Declaration, with the court paraphrasing unless test is shown with "quotation marks"):

8. \$91,700.00 was received and applied to Debtor's loan in 2018, as identified on Exhibit 1 filed with the Declaration. Also, that Exhibit 1 states the application of payments received by Debtor after May 2018 until the filing of the current Bankruptcy Case.
9. The \$91,700.00 was received on March 20, 2018 and first applied to the payments due June 1, 2015 through April 1, 2018, a period of 35 months in an amount totaling \$29,283.04.
10. After the \$29,283.04 was applied as above, Debtor and the prior loan servicer subsequently (to April 1, 2018) agreed that the principal balance of the loan would be "recast."
- 10 (cont.). The "recasting" of the loan was to apply the remaining \$61,481.20 of the Save Your Home California monies to first reduce the principal, which when combined with the payments for June 1, 2015 through April 1, 2018, by \$90,764.24, and then "935.76 for "corporate advances."

11. After application of the Save Your Home California monies in March of 2018, the principal balance of the loan was reduced from (\$170,465.08) to (\$161,874.80). The court is directed to review Exhibit 1 to see how the application of the \$91,700.00 in March 2018 resulted in a principal reduction of \$8,590.28.

The Declaration directs the court to Exhibit 3 (Dckt. 106) for the Principal Reduction and Recast Agreement (HFA Modification Assistance). With respect a principal reduction and recasting, it's provisions include (identified by paragraph number of this Agreement:

(2.) Debtor deposits \$61,141.14 with Creditor, which is to be applied to the “president balance due on principal.”

(2. cont.) This payment of \$61,141.14 is to be made as of the effective date of this Agreement.

(3.) Debtor agrees that the terms of the mortgage are modified as follows:

- ◆ (\$100,743.66) is to be paid, with interest, (the Interest Bearing Principal Balance) in monthly installments of \$325.29.
- ◆ The first \$325.29 payment is due May 1, 2018.
- ◆ The final payment will be due August 1, 2054.

Exhibit 1 (Dckt. 106) is a spreadsheet beginning with a March 2018 payment of \$91,700, and showing the application of the payment first to the monthly amounts June 1, 2015, with a starting principal balance of \$170,226.53 through April 1, 2018 with a principal balance of (\$161,874.80) (the monthly principal, interest, and escrow portion of each monthly payment shown).

Modification of Loan

Before looking the numbers on Exhibit 1, the court goes back to the 2014 Loan Modification to which the subsequent 2018 recast and Save Your Home California monies relate.

In POC 2-1 filed by Creditor Debtor's 2015 Chapter 13 Case, 15-20683, there is attached a Document titled Home Affordable Modification Agreement (“Modification Agreement”). The provisions of the Loan Modification Agreement are summarized as follows:

- A. Dated August 4, 2014.
- B. The Modification Terms are stated in ¶ 3 of the Modification Agreement, and include (identified by the paragraph number in the Modification Agreement):
 - 1. The Loan is modified effective September 1, 2014. ¶ 3.
 - 2. The first payment due under the loan modification is due September 1, 2014.
Id.

- a. The maturity date is August 1, 2054. ¶ 3.A.
3. Modified Principal Balance is (\$208,994.25) (“New Principal Balance”). ¶ 3.B.
4. (\$36,400.00) of the New Principal Balance is deferred [Non-Interest Bearing Principal Balance], with no interest or monthly payments. ¶ 3.C.
5. (\$172,594.25) is the “Interest Bearing Principal Balance” on which interest will accrue and payments will be made by Debtor. *Id.*
6. The monthly payments and interest rates on the Interest Bearing Principal Balance are, ¶ 3.C.,:
 - a. For Years 1-5 of the Modified Loan
 - (1) Interest is 2%
 - (2) Principal and Interest Payment is \$522.66/month
 - (3) Escrow Payment is \$275.14 (subject to adjustment)
 - b. For Year 6 of the Modified Loan
 - (1) Interest is 3%
 - (2) Principal and Interest Payment is \$607.21/month
 - (3) Escrow Payment is as adjusted
 - c. For Year 7 of the Modified Loan
 - (1) Interest is 4%
 - (2) Principal and Interest Payment is \$607.21/month
 - (3) Escrow Payment is as adjusted
 - d. For Years 8-40 of the Modified Loan
 - (1) Interest is 4.125%
 - (2) Principal and Interest Payment is \$677.80/month
 - (3) Escrow Payment is as adjusted
7. The Modified terms “superseded any provisions to the contrary in the Loan Documents, including but not limited to, provisions for an adjustable, step or simple interest rate.” *Id.*
8. If a default rate of interest is permitted in the Loan Documents, then in the event of a default, the interest due will be that provided in ¶ 3.C. of the Loan Modification. ¶ 3.F.

POC 2-1 filed by Creditor in the 2015 Chapter 13 Case is signed by John R. Callison, as the Authorized Agent for U.S. Bank National Association. POC 2-1, § 4, states that:

- A. Pre-Petition Arrearage as of the January 30, 2015 filing of Chapter 13 Case 15-20683 was (\$3,177.95).
- B. The Amount of the secured claim was (\$209,166.89).
- C. The Interest Rate was currently 2.00%

Additionally, on the Mortgage Proof of Claim Attachment to POC 2-1 filed in the 2015 Chapter 13 Case it states that:

- A. The principal due on the claim was.....(\$171,888.07)
- B. The interest due as of the filing of the 2015 Case was.....(\$ 859.44)
- C. The Total Principal and Interest Due was.....(\$172,747.51)
- D. Pre-Petition Fees, Expenses, and Charges.....(\$ 1,582.35)

Exhibit 1 Application of Payments

The Spreadsheet begins March 20, 2018, with a principal balance of \$170,467. This appears consistent with the \$172,747.51 non-deferred, Interest Bearing Principal Balance stated in the Loan Modification Agreement effective September 1, 2015.

Receipt of \$91,700.00 is listed as received March 20, 2018. This is then applied first to the June 1, 2015 to April 1, 2018 monthly loan payments asserted to then have been in default. With the curing of the asserted defaults, the Interest Bearing Principal Balance is stated to be \$161,874.80.

After payment of the April 1, 2018 monthly payment, there is computed to be \$61,131.14 of the \$91,700.00 received on March 20, 2018 remaining. These monies are then applied to the April 1, 2018 Interest Bearing Principal Balance, reducing it to \$100,743.66. (There is also a referenced to the “2nd UPB 36,400.00,” which the court interprets to be the non-interest bearing, deferred portion of the principal balance under the 2014 Loan Modification.)

This Spreadsheet then shows only the following amounts received and credited to the Interest Bearing Principal Balance:

10/12/2020	\$1,075.25
10/20/2020	\$ 150.00
11/12/2020	\$2,150.50
12/10/2020	\$1,075.25
4/13/2020	\$3,225.75
5/12/2021	\$2,150.50

After application of this \$10,902.50 to principal, interest, and escrow payments during the period October 10, 2020 to August 2019, the principal balance is computed by Movant to be \$97,832.07

DEBTOR'S OBJECTION TO MOVANT'S PROOF OF CLAIM

On May 2, 2022, Debtor filed an Objection to Claim filed by Movant. Dckt. 95. In the Objection it is alleged that the Proof of Claim must be reduced by a \$91,700.00 grant Debtor received and then adjusted for payments of \$10,752.50, which thereby reduces the current arrearage to \$0.00.

The Debtor's Analysis, Section IV of the Objection to Claim, begins with a "Balance" of (\$209,166.89) for the total claim, with a pre-petition arrearage of (\$3,177.95), when the 2015 bankruptcy case was filed. When one allows for the (36,400.00) non-interest bearing Deferred Principal Balance, this would result in the Interest Bearing Principal Balance being (\$172,766.89) when the 2015 bankruptcy case was filed.

Debtor then tracks the proofs of claims filed by Creditor which states the total claim amount when the various cases were filed by Debtor, which are stated in Debtor's Analysis to be:

Case 15-20683.....January 30, 2015.....(\$209,166.89)

[Between these two dates Debtor lists \$91,699.99 as being paid on Creditor's claim.]

Case 20-21485.....March 1, 2020.....(\$153,169.92) [this shows a reduction of \$55,996.97 in the claim]

[Between these two date Debtor lists \$0.00 as being paid on Creditor's claim.]

Case 20-22852.....June 1, 2020.....(\$159,190.35)

[Between these two Dates Debtor lists \$10,752.50 being paid on Creditor's claim, citing to the Trustee's Final report in Case 20-22852. See 20-22853; Trustee's Final Report, p. 1, Dckt. 231.]

Case 21-23539.....October 1, 2021.....(\$164,860.13)

These payments identified by Debtor total \$102,452.49. Debtor asserts that this documents that the \$91,700.00 Keep You Home California monies were not properly applied.

Debtor further asserts that all of the \$91,700.00 Keep Your Home California monies should have been applied to arrearages, and therefore there should be no arrearage due Creditor.

Debtor further asserts that Creditor has applied the payments to an unauthorized \$11,457.44 for attorney's fees and costs, stating that they were "not authorized by this, or any other court."

The only payments made to Creditor are stated to be those that went through the Chapter 13 Trustee in Debtor's cases and the \$91,700.00.

CONFIRMATION OF DEBTOR'S PLAN

Debtor, with representation of counsel, filed his Motion to Amend Chapter 13 Plan on January 21, 2022. See Dckt. 56. As discussed in the court's tentative ruling for Debtor's Motion to Confirm, both Movant and the Chapter 13 Trustee have opposed Debtor's Motion on various grounds. See Dckt. 73 and 75.

The court issued an order confirming Debtor's First Amended Plan on April 8, 2022. *See* Dckt. 88.

APRIL 26, 2022, HEARING ON MOTION FOR RELIEF

Though the Amended Plan, which addresses prior arrearages, has been confirmed, Debtor is now in default for the March and April 2022 monthly plan payments. Debtor's counsel stated that there is a TFS payment scheduled for April 27, 2022, and he will delivered to the Chapter 13 Trustee a cashier's check for \$850, which will cure the March 2022 default.

Counsel for Movant noted that this hearing has been continued multiple times and Movant has allowed Debtor to prosecute the confirmation of the Amended Plan which was to address the pre and post-petition defaults. Unfortunately, new defaults have occurred. Movant's counsel directed the court to the history of multiple, non-successful Chapter 13 filing by Debtor in this court.

At the hearing Debtor was visibly distressed at the proceedings and his view that Movant is trying to take his property. He has previously argued that Movant will not enter into a loan modification with him. As the court noted, Debtor's counsel is effectively forcing a five year loan modification on Movant though the confirmed Amended Chapter 13 Plan. However, the Debtor must be able to perform the Chapter 13 Plan and make the modified loan payments.

In light of the Chapter 13 Trustee being able to make a distribution to Movant in the near future, the court again continues the hearing. This is to afford Debtor and Debtor's counsel to have the hard economic talk about what Debtor can fund, how it can be funded, and what Debtor may need to do to save his exempt equity value in the Property.

JUNE 1, 2022 HEARING

As noted above, the court does not adjudicate claims objections or other substantive disputes in the context of a relief from stay motion. In these post-confirmation settings, the "cause" question focuses on whether Debtor is prosecuting his/her case – i.e. performing the Chapter 13 plan the debtor got confirmed.

The court has "strayed" into looking at the payments and the nature of the claims objection dispute for several reasons. One, to understand the magnitude of any underlying dispute. Second, and most importantly, to afford Debtor the full opportunity to not only understand the obligation and what the parties are asserting, but to make sure that Debtor understands that he and his counsel have their opportunity to present such issues to the court.

In looking at Debtor's Analysis of the payments and total claim, the court notes that he lists there being \$91,699.99 in payments to Creditor for the period June 1, 2015 through July 1, 2018.

On Creditor's Exhibit 1, for the period June 1, 2015 to April 1, 2018, states that \$30,568.85 was applied for the payments due during that period. Then, the remaining \$61,131.14 was applied to the outstanding Interest Bearing Principal Balance of (\$161,875) as of April 2018, reducing it to (\$100,743.66). In addition, there would be the Deferred Non-Interest Principal balance of (\$36,400.00), making the total claim as of April 2018 to be approximately (\$136,400.00).

Debtor then identifies an additional payments of \$10,752.50 being made after April 2018 through the commencement of this current bankruptcy case.

Proof of Claim 2-1 in Current Bankruptcy Case

The current bankruptcy case was filed on October 12, 2021, which is three years and seven months after April 2018. On Proof of Claim 2-1 in the current case, Creditor states the claim has grown to (\$164,860.13). Included in this amount are (\$14,994.93) in attorney's fees and other costs, and (\$9,628.24) in escrow deficiency and shortage. These total an additional (\$24,623.17) which is added to the claim.

If one subtracts out the (\$24,623.17), which Debtor may dispute, that leaves (\$140,236.83) for the total claim, which includes the (\$36,400.00) Deferred Non-Interest Bearing Principal Balance. Removing this amount from the claim would leave (\$103,836.83) as the Interest Bearing Principal Balance, including accrued interest.

Creditor computes the April 1, 2018 Interest Bearing Principal Balance to be (\$100,743.66) after applying the \$91,700.00 payment.

As discussed above, the interest rates during the April 2018 to October 2021 were 3% and 4%. Doing a rough average of 3.5% per year, the Interest Bearing Principal Balance of (\$100,743.66) would accrue simple interest of (\$3,526.03) a year. Extrapolating that over three years and seven months from April 2018 to the October 2021 filing of the current case, that would total (\$12,634.94) in interest.

If \$10,752.50 in payments were made during the fifteen months of Debtor's bankruptcy case 20-22852, then that would result in the obligation owing on the Interest Bearing Principal Balance increasing by (\$1,882.54), for a total of (\$103,626.20). When adding the Deferred Non-Interest Bearing Principal Balance of (\$36,400) to it, the total claim, excluding costs, fees, and expenses, would appear to be around, (\$140,026.20).

The court's approximation is a little less than the claim as stated by Creditor has claimed in Proof of Claim 2-1 in this case, which, including fees, costs and expenses, is stated to be (\$164,860.13). When (\$14,994.93) for fees, costs, and expenses are backed out, Creditor's claim for the Interest Bearing Principal Balance portion and the Deferred Non-Interest Bearing Balance portion total (\$149,865.20).

This additional (\$9,000.00) amount in Proof of Claim 2-1 over the court's estimate of principal and unpaid interest appears to be the Escrow Deficiency of (\$8,410.82) and Escrow Shortage of (\$1,217.42) listed in Proof of Claim 2-1.

Thus, it does not appear that the claim amount should be reduced further by the \$91,700.00 Keep Your Home California payment and the \$10,752.50 (a more than \$100,000 “adjustment”), but whether the costs, fees, and expenses of (\$14,994.93) should be included in the arrearage to be cured.

As stated above, the court is not making any findings or rulings on the amounts of the claim and any objection thereto, but looking at to help the court and parties clarify what issues may actually be in dispute.

Ruling on Motion for Relief

Debtor’s confirmed Chapter 13 Plan requires Debtor to make increased monthly plan payments of \$1,960.00 commencing with the February 2022 payment and each month thereafter during the term of the Plan. Order, Dckt. 88. Under the Plan, the arrearage claimed by Creditor is to be paid \$755.00 a month for fifth seven months (the plan not being fully funded for the first three months). If there is a bona fide dispute over the (\$14,994.92) in costs, fees, and expenses, those represent the tail end months of the Plan.

At the hearing on the Motion, Debtor’s counsel reported that he has one payment for \$1,960 and is getting the second payment shortly to cure the default. Debtor is renting more rooms in the house to increase his income, with Debtor moving into the garage.

Debtor has an application for a California grant to cure the arrearage pending.

Counsel for Movant commented that there is no evidence of the payments or other factual assertions. Counsel for Movant requested that specific information be documented, which counsel for Debtor agreed to promptly do.

The Parties agreed to continue the hearing in light of Debtor’s efforts to get the Plan back on track and provide the requested information. The hearing is continued to the same date and time which is set for the Objection to Movant’s claim, which the parties indicated may be a moot issue.

Trustee’s Non-Opposition to Debtor’s Objection to Claim

On June 14, 2022, Trustee filed a Non-Opposition to Debtor’s Objection to Allowance of Claim. Dckt. 111. Trustee explains that U.S. Bank has filed a Proof of Claim which shows a secured amount of \$164,860.13 and arrears of \$40,899.99. Trustee has placed a hold on U.S. Bank’s claim until the objection has been resolved or the court clarifies how the claim will be paid.

JUNE 28, 2022 HEARING

At the hearing, counsel for the Debtor reported that in light of the advances in this case, the Parties agreed to a continuance.

Creditor’s Exhibits

On July 12, 2022, Creditor attached exhibits in support of its “Declaration of Loan Servicer in Support of Motion for Relief” filed “concurrently herewith.” Dckt. 119. The court notes, however, “Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence,

exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.” LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court’s expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a).

Creditor’s declaration indicates the \$91,7000 CalHFA MAC loan proceeds were received on March 20, 2018 and applied to the following contractual payments:

Payment Dates	Total Months	Payment Amount	Total
June 1, 2015 - May 1, 2016	12 months	\$810.29	\$9,723.48
June 1, 2016	1 month	\$819.16	\$819.16
July 1, 2016 - June 1, 2017	12 months	\$817.45	\$9,809.40
July 1, 2017 - April 1, 2018	10 months	\$893.10	\$8,931.00
Total Payments Applied from CalHFA MAC loan	35 months		\$29,283.04

Creditor indicates the remaining \$61,481.20 of the \$91,700.00 CalHFA loan were applied to the principal balance of Creditor’s loan. This resulted in a remaining principal balance of \$100,746.66. Additionally, \$935.76 were applied to corporate advances.

The payments are reflected in Creditor’s Exhibit 1. Dckt. 119.

JULY 26, 2022 HEARING

At the hearing, the Parties agreed to a final final short continuance in light of the issues having been narrowed and the information provided by creditor.

AUGUST 4, 2022 HEARING AND STAYING OF PROCEEDINGS

The Debtor having dismissed the related Objection to Creditor’s Claim and the efforts being made to address Creditor’s claim through an amended Chapter 13 Plan, Creditor requested that the proceedings on this Motion be stayed and the matter removed from the Calendar.

The Debtor concurred in this request.

The court orders that these proceedings are stayed and the matter is removed from the calendar. The matter may be returned to the Calendar by Movant if it determines that grounds exist for the requested relief. The court determines that staying this matter, rather than dismissing it without prejudice, is consistent

with the efforts of Debtor and Creditor to address this claim, Debtor pursuing an amended plan, and judicial economy.

FEBRUARY 7, 2023 HEARING RESET HEARING ON THE MOTION FOR RELIEF FROM STAY

Movant filed a Notice on January 23, 2023, “restoring” the Motion for Relief. Dckt. 136. Movant states, in their notice, that cause exists to grant the relief from the automatic stay as Debtor is post-petition delinquent for November 1, 2022 and January 1, 2023 mortgage payments. The amount of the default is stated to be \$3,346.35. Movant states the Motion is based on the Declaration filed in Support of Restored Motion. Dckt. 137.

The court order from August 3, 2022, Dckt. 135, states this Motion may be reset if Movant files a supplemental pleading stating additional grounds with particularity.

Movant’s Declaration in Support of Restored Motion

Anselm Joseph, Bankruptcy Specialist for Movant, filed a Declaration on January 23, 2023. Dckt. 137. Mr. Joseph states Debtor has again defaulted on their obligations due and owing to Movant by failing to make payments for November 1, 2022 through and including January 2023. Dckt. 137.

He testifies that the last partial payment of \$459.74 was received from the Debtor on December 8, 2022.

At the hearing, counsel for the Debtor appeared, asserting a defense and a “plan” to address any shortfall in payments caused by the increase in the current monthly mortgage payment. Counsel for the Trustee reported that the Debtor is in default in the Plan payments, having not increase the monthly Plan payment when Movant’s monthly payment increase due to a change in the escrow account for the secured claim.

Given the Debtor’s oral opposition, the court sets a briefing scheduling and set the matter for a continue hearing.

Debtor’s Supplemental Opposition

Debtor filed a Supplemental Opposition on February 21, 2023. Dckt. 144. Debtor states they are only \$2,196.00 delinquent in post-petition payments and \$199.67 owing in arrears to Movant. Debtor states their arrearages are not significant enough to justify the relief requested.

Additionally, Debtor requests ability to object to the Amended Proof of Claim, as “costs” were added without court approval. Proof of Claim 2-3.

Trustee’s Nonopposition

Trustee filed a nonopposition on February 27, 2023. Dckt. 150. Trustee states Debtor is currently delinquent \$13,345.14. Trustee reflects the following arrearages owed to Movant:

Post-petition Mortgage Payments.....\$4,255.36

Pre-petition Mortgage Arrears.....\$29.92

Post-petition Mortgage Arrears.....\$526.05.

Trustee requests the Motion be granted, and notes they filed a Motion to Dismiss, Dckt. 146, which is set to be heard on April 5, 2023.

**MARCH 7, 2023 HEARING
CONTINUED HEARING ON THE RESET
MOTION FOR RELIEF FROM STAY**

At the hearing, Debtor's counsel stated that he spoke with his client and reviewed the file. A review of the record, the parties acknowledge that Debtor has been unable to make all the Plan payments, but Debtor has obtained some grants post-petition, without informing the court, and has had the grant money paid to Creditor without obtaining authorization from the court to make payments not provided for in the Plan.

Debtor's counsel was ignorant of the grants obtained and monies paid, other than saying that "his client believes it is" Debtor has not provide his attorney with any of the grant application paperwork, the documentation that the grant was awarded, or that the grant monies were paid. As the court noted at the hearing, Debtor's counsel will contact the California agency identified by Debtor as having made the grant to get the documentation and confirmation of payments made under the grant and to whom the monies were disbursed. The court emphasized that such documentation and information must be obtained, and if the agency would not do it based on the Debtor's authorization to communicate with his attorney, then a subpoena could be issued by the federal judge.

Creditor's counsel confirmed that grant money had been received by Creditor, and she believed that Creditor applied it to the arrearage. As the court noted, doing so would apply to be in contravention of the Plan and that Creditor was "curing the arrearage" and still demanding the cure payments for the arrearage, which no longer existed, by the Plan payments.

The hearing concluded with the Parties agreeing to a continuance to obtain the necessary information and come to an agreement with what had been received by Creditor. The court also suggested to both attorneys that it appears time that counsel have a heart to heart talk with their clients about their respective client's obligation in bankruptcy and that acting in contravention of the confirmed plan was not proper.

Debtor's Supplemental Opposition

Debtor filed a supplemental opposition on April 11, 2023. Dckt. 163. Debtor states based on Movant's 3rd Amended Proof of Claim, Proof of Claim 2-3, the amount necessary to cure any default is \$755.64. Debtor states they have paid \$566.97 and plan to resolve the remaining arrears of \$199.67 in a modified plan. Upon the court's review of the docket, no proposed modified plan has been filed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Annul Automatic Stay or in the Alternative In Rem Relief From Automatic Stay filed by US Bank, NA (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Relief from the Automatic Stay is continued to **1:30 p.m. on May 23, 2023**, as jointly requested by the Parties.

2. <u>22-21985</u> -E-13 <u>JL-1</u>	LINDA NOVOA HUF Peter Macaluso	CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY 12-12-22 [29]
CASE DISMISSED: 3/29/23 YOSEMITE CAPITAL, LLC, VS.		

Final Ruling: No appearance at the April 23, 2023 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2022. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is denied without prejudice as moot, the automatic stay having been terminated by dismissal of this bankruptcy case.

Yosemite Capital, LLC (“Movant”) seeks relief from the automatic stay with respect to Linda Louise Novoa Huf’s (“Debtor”) real property commonly known as 430 Justin Drive, San Francisco, California (“Property”). Movant has provided the Declaration of Tom Malgesini to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made four post-petition payments and eight pre-petition payments in default. Movant’s Information Sheet, Dckt. 29.

CHAPTER 13 TRUSTEE’S REPLY

David Cusick (“the Chapter 13 Trustee”) filed a Reply on December 20, 2022. Dckt. 35. Trustee requests the Motion be granted.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on December 27, 2022. Dckt. 44. Debtor asserts they have filed a new plan and a motion to sell the Property. Debtor asserts the proposed plan should be “given a chance to confirm” and the motion to sell should be granted prior to the approval of this Motion.

From the court’s review of the docket, Debtor has a Motion to Sell the Property scheduled for January 24, 2023. Dckt. 38. Additionally, a Motion to Confirm Debtor’s Second Amended Plan is set for February 7, 2023. Motion to Confirm, Dckt. 55. The Plan calls for all liens and encumbrances on the Property to be paid in full on or before April 1, 2023.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$1,113,688.40 (Movant Information Sheet, Dckt. 33), while the value of the Property is determined to be \$1,800,000.00, as stated in Schedules A/B and D filed by Debtor.

Although there may be cause to terminate the provisions of 11 U.S.C. § 362(d), Debtor appears to be actively prosecuting this case and making a good faith attempt to sell the Property in order to pay Movant in full.

The court continued the matter to 2:00 p.m. on January 24, 2023 allow adequate time for Debtor to sell the Property, confirm a Plan paying Movant in full, and address issues relating to the closing of the sale.

January 24, 2023

On January 20, 2023, counsel for Movant filed her Declaration (Dckt. 71), in which she testifies that Debtor has not provided Movant with proof of insurance for the Property.

At the hearing, the Parties agreed to further continue the hearing in light of the court granting the Motion to Sell the Property, which sale will provide for the payment of Movant’s secured claim.

February 7, 2023 Hearing

The court has granted Debtor's Motion to sell the Justin Drive Property for \$1,350,000. Order, Dckt., 79.

At the hearing, Debtor's counsel for the Debtor reported that the escrow is open and anticipates it closing shortly.

The court has granted Debtor's Motion to Confirm the Chapter 13 Plan that provides for the sale of the Property. Debtor and Movant agreed to the treatment of Creditors claim as a Class 2 Claim under the Plan, with a 6.8% interest rate.

The court continues the hearing for case management and to afford Movant to keep this matter "live" if relief becomes necessary (the sale falls through and Debtor is not able to actively market the property).

Dismissal of Bankruptcy Case

The instant case was voluntarily dismissed on March 29, 2023. Dckt. 107.

The applicable Bankruptcy Code provision for the matter before the court is 11 U.S.C. § 362(c)(1) and (2). That section provides:

In relevant part, 11 U.S.C. § 362(c) provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such **property is no longer property of the estate**;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) *the time the case is dismissed*; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

11 U.S.C. § 362(c) (emphasis added).

When a case is dismissed, 11 U.S.C. § 349 discusses the effect of dismissal. In relevant part, 11 U.S.C. § 349 states:

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) *revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.*

11 U.S.C. § 549(c) (emphasis added).

Therefore, as of March 29, 2023, the automatic stay as it applies to the Property, and as it applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.

The court shall issue an order confirming that the automatic stay was terminated and vacated as to Debtor and the Property on March 29, 2023.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Yosemite Capital, LLC (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice as moot, this bankruptcy case having been dismissed on March 29, 2023 (prior to the hearing on this Motion). The court, by this Order, confirms that the automatic stay provisions of 11 U.S.C. § 362(a) were terminated as to Linda Louise Novoa Huf (“Debtor”) pursuant to 11 U.S.C. § 362(c)(2)(B) and the real property commonly known as 430 Justin Drive, San Francisco, California, pursuant to 11 U.S.C. § 362(c)(1) and § 349(b)(3) as of the March 29, 2023 dismissal of this bankruptcy case.